

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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CLARE W.,

Plaintiff,

v.

3:22-CV-0505  
(ML)

KILOLO KIJAKAZI, ACTING COMMISSIONER  
OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

LACHMAN, GORTON LAW FIRM  
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SOCIAL SECURITY ADMINISTRATION  
Counsel for the Defendant  
6401 Security Boulevard  
Baltimore, Maryland 21235

MIROSLAV LOVRIC, United States Magistrate Judge

OF COUNSEL:

PETER A. GORTON, ESQ.

JASON P. PECK, ESQ.  
Special Assistant U.S. Attorney

**ORDER**

Currently pending before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

in connection with those motions on June 8, 2023, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination was not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by Plaintiff in this appeal.

After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is

**ORDERED** as follows:

- 1) Plaintiff's motion for judgment on the pleadings (Dkt. No. 10) is GRANTED.
- 2) Defendant's motion for judgment on the pleadings (Dkt. No. 12) is DENIED.
- 3) The Commissioner's decision denying Plaintiff Social Security benefits is REVERSED.
- 4) This matter is REMANDED to the Commissioner, without a directed finding of disability, for further administrative proceedings consistent with this opinion and the oral bench decision, pursuant to sentence four of 42 U.S.C. § 405(g).
- 5) The Clerk of Court is respectfully directed to enter judgment, based upon this determination, REMANDING this matter to the Commissioner for further administrative proceedings consistent with this opinion and the oral bench decision, pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

Dated: June 12, 2023  
Binghamton, New York



Miroslav Lovric  
United States Magistrate Judge  
Northern District of New York

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
CLARE W.-L.,

Plaintiff,

vs.

3:22-CV-505

KILOLO KIJAKAZI, ACTING COMMISSIONER OF  
SOCIAL SECURITY,

Defendant.

-----x  
Transcript of a **Decision** held during a  
Telephone Conference on June 8, 2023, the HONORABLE  
MIROSLAV LOVRIC, United States Magistrate Judge,  
Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and Counsel present by telephone.)

2 THE COURT: The plaintiff in this matter has  
3 commenced this proceeding pursuant to Title 42 United States  
4 Code Section 405(g) to challenge the adverse determination by  
5 the Commissioner of Social Security finding that she was not  
6 disabled at the relevant times and therefore ineligible for  
7 the benefits that she sought.

By way of background, the court sets forth the following information: Plaintiff was born in 1987. She is currently approximately 36 years of age. She was approximately 31 years of age at the alleged onset of her disability, that being on July 12 of 2018. Plaintiff stands approximately 5 feet 5 inches in height and weighs approximately 214 pounds. At the time of her administrative hearing on March 17, 2021, plaintiff lived with her fiancé. Plaintiff also had shared custody of her eight-year-old son, who lived with them on a regular basis. Plaintiff is a high school graduate who attended regular education classes, but reported academic difficulty due to dyslexia and attention deficit hyper activity disorder, also known as ADHD. Plaintiff attended several semesters of college but did not obtain a degree. Her prior employment includes work as a care aide at a residential facility for special needs individuals.

25 Procedurally in this case, the court notes as

1 follows: Plaintiff applied for Title II and Title XVI  
2 benefits on February 23rd, 2020, alleging disability  
3 beginning July 12th of 2018. In support of her claim for  
4 disability benefits, plaintiff claims disability based on a  
5 number of impairments including gastroparesis, diabetes,  
6 asthma, depression, anxiety, bipolar disorder, and ADHD.  
7 Administrative Law Judge Robyn Hoffman conducted a hearing on  
8 March 17th, 2021 to address plaintiff's applications for  
9 benefits. The ALJ issued an unfavorable decision on May 4 of  
10 2021. That decision became the final determination of the  
11 agency on March 18, 2022, when the Appeals Council denied  
12 plaintiff's request for review. This action was commenced on  
13 May 16, 2022, and it is timely.

14 In her May 4, 2021 decision, ALJ Hoffman first  
15 determined that plaintiff met the insured status requirements  
16 of the Social Security Act through March 31st, 2022, and then  
17 applied the familiar five-step test for determining  
18 disability.

19 At step one, the ALJ concluded that plaintiff had  
20 not engaged in substantial gainful activity from her alleged  
21 onset date of July 12th, 2018.

22 At step two, the ALJ concluded that plaintiff had  
23 the following severe impairments, that being asthma and  
24 uncontrolled type I diabetes mellitus, with gastroparesis and  
25 cyclical vomiting.

1                   At step three, the ALJ concluded that plaintiff did  
2 not have an impairment or combination of impairments that met  
3 or medically equaled the severity of one of the listed  
4 impairments in 20 C.F.R. Sections 404.1520(d), 404.1525, and  
5 404.1526, and the ALJ focusing on listing at 3.02, dealing  
6 with chronic respiratory disorders; listing at 3.03, dealing  
7 with asthma; listing at 5.00, dealing with digestive system;  
8 and listing at 9.00, dealing with endocrine disorders.

9                   Next, the ALJ determined that plaintiff had the  
10 residual functional capacity, also known as RFC, to perform  
11 less than the full range of light work. Specifically, the  
12 ALJ found plaintiff can lift and carry 20 pounds occasionally  
13 and 10 pounds frequently, sit for up to six hours, and stand  
14 or walk for six hours, all in an eight-hour workday with  
15 normal breaks. The plaintiff -- excuse me. The ALJ also  
16 indicated that plaintiff can occasionally climb ladders,  
17 ropes, or scaffolds, and can frequently climb ramps or  
18 stairs, kneel, crouch, and crawl. The ALJ also decided that  
19 plaintiff should avoid exposure to excessive amounts of  
20 extreme hot and cold temperatures and respiratory irritants,  
21 such as dust, odors, fumes, and gases. The ALJ also decided  
22 that the plaintiff can perform work that requires little or  
23 no judgment to do simple duties that may be learned on the  
24 job in a short period of time.

25                   In reaching her RFC determination, the ALJ

1 considered multiple medical and psychiatric opinions. She  
2 found the July 14, 2020 opinion of Dr. B. Patel and the  
3 November 24th, 2020 opinion of Dr. B. Stouter to be  
4 persuasive. Both of these nonexamining state agency  
5 consultants opined that plaintiff was capable of light  
6 exertion and could "occasionally" climb ladders, ropes, and  
7 scaffolds, "frequently" climb ramps and stairs, kneel,  
8 crouch, and crawl, and should avoid concentrated exposure to  
9 respiratory irritants. The ALJ adopted all of these  
10 limitations into her RFC determination.

11 The record contains two opinions from consultative  
12 examiner Dr. Gilbert Jenouri, dated June 27, 2019 and July 8,  
13 of 2020. The ALJ found these opinions to be persuasive to  
14 the extent each was consistent with the ability to perform  
15 light work, but rejected Dr. Jenouri's June 2019 opinion that  
16 plaintiff would have marked schedule disruptions due to  
17 complications from diabetes as, the ALJ stated, "purely  
18 speculative and unsupported by any objective evidence." The  
19 ALJ noted that plaintiff had visited the emergency room  
20 multiple times for abdominal pain and diabetic complications  
21 but found that most of these visits occurred prior to the  
22 alleged onset date. The ALJ also noted that the symptoms  
23 associated with plaintiff's diagnosed gastroparesis had not  
24 prevented her from performing activities of daily living,  
25 such as caring for her son, and found no evidence that the

1 symptoms caused her to regularly miss or arrive late for  
2 scheduled medical appointments.

3 The ALJ likewise rejected the February 16, 2021  
4 opinion of Nurse Practitioner Nancy Evans, who had treated  
5 plaintiff for diabetes and related complications since 2012.  
6 Nurse Practitioner Evans opined that plaintiff would need  
7 unlimited access to a bathroom while working, and that her  
8 need to use a bathroom would be urgent and immediate. Nurse  
9 Practitioner Evans also opined that plaintiff's symptoms and  
10 medication -- let me start that over. Evans also opined that  
11 plaintiff's symptoms and medication side effects would cause  
12 pain, fatigue, diminished concentration, and reduced work  
13 pace. She further opined that these limitations would force  
14 plaintiff to rest during the workday, cause her to be off  
15 task between 20 percent and 30 percent of the time, and lead  
16 to more than four unscheduled absences per month. Although  
17 the ALJ found Nurse Practitioner Evans' opinion to be  
18 unpersuasive, the ALJ stated that her RFC determination made  
19 some accommodation for these purported limitations by  
20 restricting plaintiff to "work that requires little or no  
21 judgment to do simple duties that may be learned on the job  
22 in a short period of time."

23 At step four, the ALJ relied on the vocational  
24 expert testimony to determine that plaintiff could not  
25 perform her past relevant work. Again relying on the

1 vocational expert testimony, the ALJ found that, considering  
2 plaintiff's age, education, work experience, and residual  
3 functional capacity, there were jobs that existed in  
4 significant numbers in the national economy that she could  
5 have performed. More specifically, the vocational expert  
6 testified that plaintiff could perform the requirements of  
7 representative light work occupations, such as hand packer,  
8 production worker, and production inspector. Accordingly,  
9 the ALJ found that plaintiff was not disabled from the  
10 alleged onset date through the date of the disability  
11 determination.

12 Now turning to the plaintiff's arguments. As the  
13 parties know, this court's functional role in this case is  
14 limited and extremely deferential. I must determine whether  
15 correct legal principles were applied and whether the  
16 determination is supported by substantial evidence, defined  
17 as such relevant evidence as a reasonable mind would find  
18 sufficient to support a conclusion. As the Second Circuit  
19 noted in *Brault v. Social Security Administration*  
20 *Commissioner*, found at 683 F.3d 443, 2012 case, the standard  
21 is demanding, more so than the clearly erroneous standard.  
22 The court noted in *Brault* that once there is a finding of  
23 fact, that fact can be rejected only if a reasonable fact  
24 finder would have to conclude otherwise.

25 Plaintiff raises several contentions in this

1 proceeding and on this appeal. First, the plaintiff alleges  
2 that the ALJ erred by excluding any limitations related to  
3 time off task and absenteeism from her RFC determination.

4 Next, the plaintiff argues that the ALJ's  
5 evaluation of the medical opinions of Dr. Jenouri and Nurse  
6 Practitioner Evans were not supported by substantial  
7 evidence.

8 Next, the plaintiff also argues that the ALJ's  
9 hypothetical question to the vocational expert did not fully  
10 account for plaintiff's functional limitations, resulting in  
11 a step five determination that is not supported by  
12 substantial evidence.

13 The court begins its analysis and reasoning in this  
14 matter as follows: Plaintiff reported she began working a  
15 reduced schedule and eventually had to stop working entirely  
16 due to gastroparesis that regularly caused episodes of  
17 extreme abdominal pain, nausea, and vomiting lasting several  
18 days. Following a searching review of the record, this court  
19 finds that the ALJ failed to marshal substantial evidence to  
20 explain her determination that plaintiff's diabetic  
21 complications, particularly gastroparesis, would not impact  
22 plaintiff's ability to remain on task during the workday or  
23 maintain regular attendance at work.

24 "At their most basic, the amended regulations  
25 require that the ALJ explain [her] findings regarding the

1 supportability and consistency for each of the medical  
2 opinions, 'pointing to specific evidence in the record  
3 supporting those findings.'" See case of *Raymond M. v.*  
4 *Commissioner of Social Security*, found at 5:19-CV-1313,  
5 issued by Magistrate Judge Andrew T. Baxter. That's found at  
6 2021 WL 706645, at \*8, and that's a Northern District of  
7 New York February 22nd, 2021 case.

8 The ALJ rejected the only two medical opinions that  
9 address the issues of time off task and absenteeism, but the  
10 ALJ failed to articulate a clear rationale for doing so. See  
11 *Joseph H. v. Commissioner of Social Security*, 19-CV-587, 2020  
12 WL 2736276, at \*8, and that is a Northern District New York  
13 May 26, 2020 case issued by Judge Baxter, remanding where ALJ  
14 never explained how she concluded that plaintiff's  
15 impairments would only force him to be off task 5 percent of  
16 the workday, rather than the more restrictive limitations  
17 described by the relevant medical opinions.

18 The primary factors cited by the ALJ in rejecting  
19 Dr. Jenouri's June 2019 opinion and Nurse Practitioner Evans'  
20 February 20, 2021 opinion -- plaintiff's activities of daily  
21 living, such as caring for her son, and plaintiff's ability  
22 to consistently make her medical appointments -- these  
23 observations by the ALJ do not constitute substantial  
24 evidence to support the ALJ's conclusion that plaintiff had  
25 no limitations with remaining on task or maintaining regular

1 attendance. See case of *Rucker v. Kijakazi*, 48 F.4th 86 at  
2 page 93, that's a Second Circuit 2022 case, finding that an  
3 individual's regular attendance at medical appointments is  
4 unhelpful in determining that the individual can show up and  
5 successfully function in a work environment. See also case  
6 of *Patrick M. v. Saul*, found at 18-CV-290, that's a  
7 Magistrate Judge Baxter case, 2019 WL 4071780, at \*10, and  
8 that's a Northern District New York August 28, 2019 case, and  
9 therein, Magistrate Judge Baxter found plaintiff's ability to  
10 attend medical appointments and engage in other daily  
11 activities of limited duration did not correlate to his  
12 ability to stay on task during an eight-hour workday.

13 Likewise, although the ALJ stated that she limited  
14 plaintiff to unskilled jobs with simple tasks to address  
15 Nurse Practitioner Evans' opinion, the ALJ did not explain  
16 how this accommodation bore any relations to Nurse  
17 Practitioner Evans' concern that plaintiff would need  
18 frequent and immediate access to a bathroom during the  
19 workday in excess of normal break periods, and would miss  
20 work more than four days per month. See case of *Brian D. v.*  
21 *Commissioner of Social Security*, found at 21-CV-1368, that is  
22 a decision by Magistrate Judge Hummel, and can be found at  
23 2023 WL 1765429, at \*8, that's a Northern District New York  
24 February 3rd, 2023 case, and therein, Judge Hummel remanded  
25 the matter where the ALJ did not explain how low stress work

1 addressed physician's concerns about plaintiff's irritable  
2 bowel syndrome, and thus did not provide good reasons for  
3 discounting physician's opinion that plaintiff would be off  
4 task and miss work beyond typical employer tolerances.

5 Finally, although the ALJ's RFC determination  
6 characterizes examination results as "largely benign," those  
7 same treatment notes frequently showed abnormal abdominal  
8 tenderness, pain, and distention, and treatment sources  
9 described only "mild improvement" in plaintiff's symptoms.  
10 An ALJ is not qualified to assess a claimant's RFC on the  
11 basis of bare medical findings, and the ALJ has not cited any  
12 medical expert who found plaintiff's gastroparesis symptoms  
13 to be under control. Indeed, the only medical experts to  
14 specifically address the issue, that being Dr. Jenouri and  
15 Nurse Practitioner Evans, found otherwise. Moreover, the  
16 nonexamining medical consultants relied upon by the ALJ did  
17 not have access to either of these opinions when reviewing  
18 plaintiff's records. Dr. Jenouri's June 2019 opinion was  
19 issued as part of a prior application that was consolidated  
20 with this claim, and ALJ Hoffman only added it to the  
21 administrative record in March of 2021. Transcript at pages  
22 363 to 364. Nurse Practitioner Evans' February 2021 opinion  
23 was issued after the initial denial.

24 At the March 17, 2021 hearing, the ALJ heard  
25 vocational expert testimony that employers typically would

1 not tolerate employees who were off task more than 10 percent  
2 of the workday or had more than eight unscheduled absences in  
3 a year. Because a proper evaluation of the record evidence  
4 may lead the ALJ to conclude that plaintiff's time off task  
5 and absenteeism exceeds the typical employer tolerance, this  
6 court cannot find that the ALJ's error is harmless and must  
7 order remand for further administrative proceedings.

8 In deciding that remand is required, this court is  
9 not deciding that a proper evaluation of the evidence  
10 regarding time off task and absenteeism will result in a  
11 determination that plaintiff qualifies for disability  
12 benefits. An ALJ must "build an accurate and logical bridge  
13 from the evidence to [her] conclusion to enable a meaningful  
14 review." See *Pamela P. v. Saul* at 19-CV-575, and that is a  
15 Magistrate Judge Daniel Stewart case, found at 2020 WL  
16 2561106, at \*4, that's a Northern District New York May 20th,  
17 2020 case, and therein, Judge Stewart quoting from *Steele v.*  
18 *Barnhart*, 290 F.3d 936 at page 941, a Seventh Circuit 2002  
19 case. In ordering remand, this court finds that the ALJ's  
20 current evaluation of the record evidence, as expressed in  
21 her decision, does not permit that meaningful review.  
22 Because the resolution of this issue on remand may impact  
23 other parts of the ALJ's disability determination, this court  
24 declines to address plaintiff's remaining arguments.

25 So based upon this analysis and reasoning, it is

1 the court's decision that plaintiff's motion for judgment on  
2 the pleadings is granted and defendant's motion for judgment  
3 on the pleadings is denied, and this case is remanded to the  
4 Social Security Administration for a *de novo* review pursuant  
5 to my reasoning, analysis and decision herein. As I  
6 indicated, the court will order a transcript of this decision  
7 that I've placed on the record. I will then file a summary  
8 order and attach the transcript to that summary order, and  
9 that will constitute my decision and order in this matter.

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1 CERTIFICATE OF OFFICIAL REPORTER  
2  
3

4 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
5 Official Realtime Court Reporter, in and for the  
6 United States District Court for the Northern  
7 District of New York, DO HEREBY CERTIFY that  
8 pursuant to Section 753, Title 28, United States  
9 Code, that the foregoing is a true and correct  
10 transcript of the stenographically reported  
11 proceedings held in the above-entitled matter and  
12 that the transcript page format is in conformance  
13 with the regulations of the Judicial Conference of  
14 the United States.

15

16 Dated this 9th day of June, 2023.  
17  
18

19 /S/ JODI L. HIBBARD  
20  
21

22 JODI L. HIBBARD, RPR, CRR, CSR  
23 Official U.S. Court Reporter  
24  
25